IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

TUESDAY, THE 18TH DECEMBER 2007 / 27TH AGRAHAYANA 1929

OP.No. 6142 of 2002(F)

PETITIONER:

E. ABDUL RAHIMAN, S/O. E. MOHAMMED,
EYYANTHAYIL HOUSE, VANIYANNUR, IRINGAVOOR P.O.,
MALAPPURAM DISTRICT, REPRESENTD BY THE POWER OF
ATTORNEY HOLDR V. ABDUL AZEEZ, S/O. KUNHALAN
HAJI, VELLATHUR HOUSE, THRIKKANDIYOOR,
TIRUR-4, MALAPPURAM DISTRICT.

BY ADV. SRI.GEORGE POONTHOTTAM

RESPONDENTS:
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1. UNION OF INDIA, REPRESENTED BY THE
MINISTRY OF FINANCE, NEW DELHI.

2. THE COMMISSIONER OF CUSTOMS,
CUSTOMS HOUSE, COCHIN-9.

BY ADV. SRI.P.GOPINATH MENON, AMICUS CURIAE

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 18/12/2007, THE COURT ON 18/12/2007 DELIVERED THE FOLLOWING:

ORDER ON CMP NO.10842/2002 IN O.P. NO.6142/2002

DISMISSED:

18.12.2007 SD/-(C.N.RAMACHANDRAN NAIR, JUDGE.)

APPENDIX

PETITIONER'S EXHIBITS:

P1: TRUE COPY OF THE ADJUDICATION ORDER DT.6.2.2002.

P2: TRUE COPY OF THE RECEIPT DT.29.1.2001.

P3: TRUE COPY OF THE DEMAND DRAFT GIVEN TO R2 DT.25.2.2002.

TRUE COPY

PA TO JUDGE

C.R.

C.N.RAMACHANDRAN NAIR, J.

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O.P. No.6142 of 2002

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Dated this the 18th day of December, 2007.

JUDGMENT

A Toyota Land Cruiser Jeep imported by the petitioner from U.A.E. was confiscated by the Customs under Section 111(d) and 111(m) of the Customs Act and was ordered to be released on payment of redemption fine and personal penalty as provided under Section 125 of the Customs Act. The findings in Ext.P1 order which has become final is that the vehicle was not eligible for transfer of residence benefits claimed by the petitioner and the import made without import licence by making misdeclaration and misrepresentation was illegal. The operative portion of the final adjudication order is as follows:

> "I order that the confiscated Toyota Land Cruiser Jeep shall be redeemed to the importer on payment of a fine of Rs.1,00,000/- (Rupees one lakh only) under Section 125 of the Customs Act. Duty and other charges leviable shall be paid as per the requirements. I impose a penalty of Rs.25,000/- (Rupees twenty five thousand only) on Shri.Abdul Rahman and Shri.Yahoo and Rs.50,000/- (Rupees fifty thousand only) on Shri.Abdul Nazar under Section 112(a) of the Customs Act, 1962."

The petitioner has remitted the import duty, redemption fine, other charges

and the personal penalty imposed on him. Along with petitioner Sri.Abdul Nazar against whom a personal penalty of Rs.50,000/- was levied under Section 112(a) of the Customs Act, also remitted the same. However, Sri.Yahoo on whom a personal penalty of Rs.25,000/- was levied under the above order, has not remitted the same. Consequently the Customs authorities refused to release the car to the petitioner. The petitioner has filed this O.P. for a declaration that penalty imposed on Mr.Yahoo cannot be recovered from the petitioner and consequently petitioner is entitled to release of the vehicle without payment of the penalty levied on Mr.Yahoo.

2. I heard counsel appearing for the petitioner and Sri.P.Gopinatha Menon, Advocate appointed as Amicus Curie by this court to assist the court. Even though the O.P. was filed in 2002 and was pending for the last 5 years, no counter affidavit is filed on behalf of the respondents. Moreover, inspite of direction by this court to the Customs on 23.7.2002 to proceed for recovery of the personal penalty from the person against whom it is levied i.e. Mr.Yahoo, it is not known whether the respondents took any measures in the matter.

3. The question to be considered is whether penalty levied on Mr.Yahoo could be recovered from the petitioner or whether the imported vehicle could be retained by the Customs for recovery of the personal

penalty levied on Sri.Yahoo. It is seen from the impugned order Ext.P1 that separate penalty is levied on the importer namely, the petitioner and two other persons against whom proceedings for penalty was initiated under Section 112(a) of the Customs Act. The personal penalty levied against Sri.Yahoo under Section 112(a) of the Customs Act is for helping the petitioner to commit the offence i.e. for abetment. The penalty so levied being personal cannot be recovered from the importer or any other person. Therefore, the petitioner is not personally liable for the penalty levied on Sri.Yahoo and the amount also cannot be recovered from the petitioner. The next question to be considered is whether the vehicle imported by the petitioner could be detained by the Customs until personal penalty levied on Sri.Yahoo is paid or recovered. This is permissible only if the statute creates charge for the personal penalty on the imported vehicle which is not there in the statute. Release of vehicle after confiscation is covered by Section 125 of the Act which gives an option to the importer to pay the fine levied in lieu of confiscation and the import duty and other charges. Petitioner has admittedly remitted the import duty, redemption fine, personal penalty and other charges for releasing the vehicle pursuant to order issued under Section 125 of the Act. The Supreme Court has considered the nature of penalty levied under various provisions of the

Customs Act in the decision in UNION OF INDIA V. MUSTAFA & NAJIBAI TRADING CO. (1998) 6 SCC 79 whereunder the court has held as follows:

> "This distinction between the nature of the two penalties, viz., penalty in rem and penalty in personam, has been maintained in the Act. The provision regarding confiscation of goods contained in Sections 111 and 113 of the Act is a penalty in rem which is enforced against the goods, while the personal penalties imposed under Section 112 and other provisions of the Act are in the nature of penalty in personam which are enforced against the person concerned."

Since the penalty levied on Sri.Yahoo under Section 112(a) is a personal penalty, it cannot be recovered against the importer or against the goods. The O.P. is therefore allowed declaring that the personal penalty imposed on Sri.Yahoo vide Ext.P1 order cannot be recovered from the petitioner or against the vehicle imported by him. It would be open to the respondents to proceed for recovery against the defaulter personally in exercise of powers conferred under Section 142 of the Customs Act.

I place on record the valuable assistance rendered by Sri.P.Gopinatha Menon who was appointed as Amicus Curie by this court.

C.N.RAMACHANDRAN NAIR
Judge

pms